

**MOTION FILED**  
**JAN 18 1983**

No 82-1075

IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

CPG PRODUCTS CORP. and GENERAL MILLS  
FUN GROUP, INC., Petitioners,  
v.  
ANTI-MONOPOLY, INC., Respondent.

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On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE FOR THE BAR ASSOCIATION  
OF THE DISTRICT OF COLUMBIA AND THE DISTRICT  
OF COLUMBIA BAR IN SUPPORT OF THE PETITION  
FOR WRIT OF CERTIORARI

Bar Association Of The District Of Columbia  
James B. Lynn  
James N. Dresser, Counsel of Record  
Jay F. Moldovanyi  
1819 H. Street N.W.  
Washington, D.C. 20006  
(202) 659-2811

District Of Columbia Bar\*  
Thomas J. Macpeak  
J. Timothy Hobbs  
1776 K Street N.W.  
Washington D.C. 20006  
(202) 293-7060

\* The views expressed herein represent only those  
of Division 14, Patent, Trademark and Copyright,  
of the District of Columbia Bar and not those of  
the D.C. Bar or its Board of Governors.

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The Bar Association of the  
District of Columbia and the District of  
Columbia Bar respectfully request the  
Court to grant them leave to file a brief  
as Amicus Curiae in CPG Products Corp. and  
General Mills Fun Group, Inc. v. Anti-  
Monopoly, Inc., No. 82-1075 which is on  
petition for writ of certiorari to the  
Ninth Circuit Court of Appeals.

On January 3, 1983 James N. Dresser on behalf of both Bar organizations requested permission from CPG Products Corp. and Anti-Monopoly, Inc. to file an amicus brief on behalf of CPG Products Corp.'s petition for certiorari. Counsel for Anti-Monopoly denied permission, and CPG Products Corp. consented. Copies of the correspondence have been filed with the Clerk of the Court.

The Bar Association of the District of Columbia is a voluntary nonprofit membership organization of over 4,400 attorneys. The District of Columbia Bar is a mandatory non-profit membership organization of over 38,000 attorneys. In both Bar organizations, membership is not restricted to any segment of the profession, and thus the members and their clients represent widely diverging

interests and views. In both organizations members include attorneys in private practice as well as those employed by corporations and those in government.

The Patent, Trademark and Copyright Law Section of the Bar Association of the District of Columbia includes members of the bar regularly practicing in and interested in trademark law. Likewise, members of Division 14, the Patent, Trademark and Copyright Division of the District of Columbia Bar, include attorneys regularly practicing in and interested in trademark law. Members of both of these groups regularly represent trademark owners and accused infringers and are thus concerned both with the enforcement of trademarks and with the defense against trademark infringement actions.

Therefore, the Bar organizations respectfully request this Court to grant them leave to file a joint brief as Amici Curiae in this case.

Respectfully Submitted,

THE BAR ASSOCIATION OF THE  
DISTRICT OF COLUMBIA and  
THE DISTRICT OF COLUMBIA BAR  
By Their Counsel

---

James N. Dresser,  
Chairman, Patent, Trademark  
and Copyright Law Section of  
The Bar Association Of The  
District Of Columbia,  
1819 H Street N.W.,  
Washington, D.C. 20006  
(202) 659-2811

---

Thomas J. Macpeak  
Chairperson,  
Steering Committee,  
Division 14  
(Patent, Trademark and  
Copyright Law)  
District Of Columbia Bar  
1776 K Street N.W.  
Washington, D.C. 20006  
(202) 293-7060

**Of Counsel**

**Jay F. Moldovanyi**  
**Amicus Briefs Committee,**  
**Patent, Trademark and**  
**Copyright Law Section**  
**of The Bar Association**  
**Of The District of Columbia**  
**699 Prince Street**  
**Alexandria, Va. 22313**

**J. Timothy Hobbs,**  
**Chairman, Trademarks Committee,**  
**Division 14**  
**of The District Of Columbia Bar**  
**1730 Rhode Island Avenue, N.W.**  
**Washington, D.C. 20036**

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I. AUTHORITY TO FILE

This Amicus Curiae Brief is submitted under Rule 36.1, together with a motion for leave to file brief Amicus Curiae.

II. INTEREST OF AMICI

The Bar Association of the District of Columbia is a voluntary nonprofit membership organization of over 4,400 attorneys. The District of Columbia Bar is a mandatory non-profit membership organization of over 38,000 attorneys. In both Bar organizations, membership is not restricted to any segment of the profession, and thus the members and their clients represent widely diverging interests and views. In both organizations members include attorneys in private practice as well as those employed by corporations and those in government.

The Patent, Trademark and Copyright Law Section of the Bar Association of the District of Columbia includes members of the bar regularly practicing in and interested in trademark law. Likewise, members of Division 14, the Patent Trademark and Copyright Division of the District of Columbia Bar include attorneys regularly practicing in and interested in trademark law. Members of both of these groups regularly represent trademark owners and accused infringers and are thus concerned both with the enforcement of trademarks and with the defense against trademark infringement actions.

In this brief the Bar Association of the District of Columbia and the District of Columbia Bar support the petition for a writ of certiorari of CPG Products Corp. and General Mills Fun Group, Inc.

It is the sole purpose of this brief to persuade this Honorable Court that the petition for certiorari should be accepted because the precedent set below radically alters established trademark law in a manner having immediate adverse consequences on the public and on trademark owners and because the decision below conflicts with decisions of the Court of Appeals for the Federal Circuit.

### III. THE DECISION BELOW

This well known case is the culmination of a declaratory judgment action filed by Anti-Monopoly, Inc. in 1974 to invalidate Parker Brothers' MONOPOLY trademark for a real estate board game.

The trial court initially held the MONOPOLY mark valid in an unreported decision, but this decision was over-

turned by the Court of Appeals for the Ninth Circuit for having misapplied the criteria for determining whether a designation has become a common descriptive name (generic). (Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 611 F.2d 296 (9 Cir. 1979) Anti-Monopoly I). On remand, the trial court again determined the mark to be valid. (Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 515 F.Supp. 443 (N.D. Cal. 1981) Anti-Monopoly II) but was again reversed. In its second decision, the appellate court found the MONOPOLY mark a generic designation based primarily on a motivation survey submitted by Anti-Monopoly, Inc. (Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9 Cir. 1982) Anti-Monopoly III).

A single motivation survey was conducted for Anti-Monopoly. In this survey,

"people who said that they had purchased the game (MONOPOLY) within the last couple of years or would purchase it in the near future were then given a choice of two statements and were asked which best expressed their reasons. Sixty-five percent chose: 'I want a 'Monopoly' game primarily because I am interested in playing 'Monopoly,' I don't much care who makes it.' Thirty-two percent chose: 'I would like Parker Brothers' 'Monopoly' game primarily because I like Parker Brothers' products.' Anti-Monopoly III, 684 F.2d at 1324.

Based on the results of that motivation survey, the Ninth Circuit held that the primary significance of MONOPOLY was product rather than source and that the term had therefore become generic. Anti-Monopoly III, 684 F.2d at 1325-26.

#### IV. QUESTIONS PRESENTED

1. Whether the judicial standard enunciated by the Court of Appeals

for the Ninth Circuit, if generally adopted, would devastate the federal trademark system and would engender consumer confusion.

2. Whether the decision of the Court of Appeals for the Ninth Circuit conflicts with decisions of the Court of Customs and Patent Appeals as adopted by Court of Appeals for the Federal Circuit<sup>1/</sup> both as to the applicable

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<sup>1/</sup> By reason of the Court Reorganization Act of 1982, Public Law 97-164, the Court Of Appeals For The Federal Circuit (CAFC) has been formed through the merger of the Court of Customs And Patent Appeals (CCPA) and the Court of Claims. While the reorganization was designed, at least in part, to eliminate conflicts between the Circuits in patent cases, concurrent appellate jurisdiction over trademark cases has continued. The Court of Appeals for the Federal Circuit (CAFC) has adopted the precedent of its predecessor courts, including the Court of Customs and Patent Appeals (CCPA). *South Corp. v. United States*, \_\_\_ F.2d \_\_\_, 215 USPQ 657 (CAFC 1982).

judicial standard and with regard to the MONOPOLY trademark at issue.

V. ARGUMENT

A. The Decision Below Devastates  
The Federal Trademark System  
And Will Engender Consumer  
Confusion

The Ninth Circuit determined that the federally registered and extensively used trademark, MONOPOLY, was generic and therefore invalid. The judicial standard which forms the basis for this decision, if allowed to stand, would likewise provide a basis for destroying a great number of federally registered and famous marks for distinctive products of all sorts: laundry detergents, clothing, drugs, soft drinks, etc. This would obviously undermine the federal trademark law.



The current federal trademark law is the Lanham Trademark Act of 1946, 15 U.S.C. Sections 1051-1127. The question of when a registered trademark may be cancelled was discussed by Congress and language was carefully drafted to provide for that contingency. Section 14(c) of the Lanham Act, 15 U.S.C. Section 1064(c), authorizes cancellation of a trademark registration "at any time if the registered mark becomes the common descriptive name of an article or substance." Clearly, whether a mark has become "a common descriptive name" of a product depends on whether the public no longer associates what was a trademark with a single source. Motivation for purchasing a product does not address itself to that question.

The Ninth Circuit in holding the MONOPOLY mark invalid relied on a



motivation survey and confused public recognition of well known marks with the legislative requirement that the registered trademark have become a "common descriptive name" before cancellation of the trademark would be afforded.

A motivation survey seeks only to determine why consumers buy products and is not directed to the central question in any genericness case decided under the Lanham Act, which should be what a term means to consumers. As was cogently pointed out recently by Judge Nies of the Court of Customs and Patent Appeals, consumer motivation is, or should be, legally immaterial.

"The reason the public is motivated to buy the product, whether because of quality, particular features, source, pleasing design, association with other goods, price, durability, taste, or prestige of ownership, is of concern to market researchers but is

legally immaterial to the issue of whether a particular designation is generic."2/

Obviously, most consumers choose a particular product primarily because they desire that product and not because they have a fondness for the producer (source) of that product, whose identity they may not even know. As the district court observed in rejecting the motivation survey "(o)nly a shareholder of the General Mills Fun Group (Parker Brothers' parent) could reasonably be expected to purchase a Parker Brothers' game out of an affection or goodwill for the corporation." Anti-Monopoly II, 515 F. Supp. at 454.

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2/ In re D.C. Comics, Inc., \_\_\_ F.2d \_\_\_, 215 USPQ 394, 404, special concurrence by Judge Nies (CCPA 1982).

Regardless of the outcome of this particular case<sup>3/</sup>, the test for "genericness" promulgated by the Ninth Circuit will devastate the federal trademark registration system as a whole. This is so because the test adopted by the Ninth Circuit could render virtually every registered trademark unenforceable.<sup>4/</sup>

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<sup>3/</sup> There are some commentators who feel that trademark registrations for games are suspect in general (see e.g. McCarthy, Trademarks and Unfair Competition §12:11C, 1973). At this time your Amici take no position on this issue.

<sup>4/</sup> Based on the Ninth Circuit's decision, unethical exploiters of nationally known trademarks may now commission field surveys and, on receiving reports that more of the public identifies the mark with the product than with its manufacturer, begin to use previously registered trademarks on the ground that they have become the common descriptive name of a product. This will certainly sow chaos in the marketplace and engender an enormous amount of litigation, with its concomitant cost, which will ultimately be borne by consumers.

The precarious position in which trademark owners find themselves in the Ninth Circuit is illustrated by a motivation survey taken by General Mills on the well known TIDE laundry detergent trademark. The motivation survey, which was raised in the court below, conformed to the Ninth Circuit test and showed that 68% of those surveyed purchased TIDE detergent primarily because they liked the product and not primarily because they liked Procter & Gamble (the producer) products. Anti-Monopoly III, 684 F.2d at 1326. When this was pointed out to the court, the Ninth Circuit stated that in light of this survey "Procter & Gamble might have cause for alarm." Anti-Monopoly III, 684 F.2d at 1326. Under this judicial standard, virtually all trademark owners have "cause for alarm", at least in the Ninth Circuit.

Surely, the average consumer does not think that TIDE is the "common descriptive name" for all laundry detergents. Violence would obviously be done to the trademark system, not to mention the public interest, if everyone could now, because of the precedent established below, market a laundry detergent and call it TIDE.

B. The Decision Of The Ninth Circuit Conflicts With Decisions Of The Court Of Appeals For The Federal Circuit Both As To The Applicable Judicial Standard And With Regard To The MONOPOLY Trademark At Issue

1. There Is A Conflict Over The Applicable Rule of Law Between The Courts Of Appeal

It is generally recognized by the courts that most consumers do not know, and need not know, which manufacturer is the specific source of the

trademarked products purchased.<sup>5/</sup> Consumers recognize that the trademarked product has a consistent level of quality and they expect that quality when they purchase the trademarked item. The ability to purchase trademarked products from a consistent, even if anonymous, source is a significant benefit to the public which flows from the trademark system.

The Court of Customs and Patent Appeals (CCPA), which was previously charged with reviewing decisions of the Trademark Office has consistently taken this position.<sup>6/</sup> As the CCPA stated in

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<sup>5/</sup> Dan Robbins & Associates, Inc. v. Questor Corp., 599 F.2d 1009 (CCPA 1979) and the cases cited therein.

<sup>6/</sup> See, e.g., In re D.C. Comics, supra, 215 USPQ 657; and E. I. Du Pont de Nemours & Co. v. Celanese Corp., 167 F.2d 484 (CCPA 1948).

Dan Robbins & Associates, Inc. v. Questor Corp., "(i)t is enough that purchasers can rely on a mark to distinguish products emanating from different sources and a mark need not identify a specific source."<sup>7/</sup>

Motivation for purchasing a trademarked product, whether it is the product itself or the source of the product, does not and should not change a federally registered trademark into a generic term. As has been recently noted in In re D.C. Comics, the correct inquiry should be "whether the public no longer associates what was a trademark with that single source."<sup>8/</sup> This issue should have been the focus of inquiry by the Ninth

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<sup>7/</sup> Dan Robbins, supra, 599 F.2d at 1014.

<sup>8/</sup> In re D.C. Comics supra, 215 USPQ at 404.



Circuit. Since buyer motivation was the focus of inquiry instead of the public's association of a trademark with a source, a result was achieved which devastates the federal trademark registration system and which conflicts with the decisions of the CAFC.

Not only does the Monopoly III decision ignore the appropriate Lanham Act test (is the trademark the "common descriptive name" of the goods?), but it improperly focuses on the consumers primary motivation for buying. The Ninth Circuit placed paramount importance on whether consumers were motivated to buy out of an affection for a specific, named manufacturer. This flies in the face of the interpretation of the trademark law evolved by the CCPA; and now adopted by the CAFC.



2. There Is A Conflict Between  
The Courts Of Appeal With  
Regard To The MONOPOLY  
Trademark

The motivation survey promulgated by the Ninth Circuit in determining genericness -- whether the purchaser professes to be primarily motivated by loyalty to a particular producer rather than by a desire for the product which the trademark identifies -- was used to invalidate the registration of the MONOPOLY mark. In direct contrast thereto, in 1981, the CCPA determined that the owner of the MONOPOLY mark "has built up enormous goodwill in the mark MONOPOLY, which has been used since 1935 for a board game and that MONOPOLY may properly be termed a 'famous' mark".<sup>9/</sup>

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<sup>9/</sup> Tuxedo Monopoly, Inc. v. General Mills Fun Group, 209 USPQ 986, 988 (CCPA 1981).

The CCPA's recognition of the strength of the MONOPOLY mark is totally irreconcilable with the Ninth Circuit's apparent willingness to allow even board game manufacturers to use the mark MONOPOLY, on competing board games.

VI. CONCLUSION

The decision of the Ninth Circuit devastates the federal trademark system and will engender consumer confusion and, if it is not reversed, will sow chaos in the merchandising of trademarked products. Moreover, the Ninth Circuit's decision conflicts with decisions of the CCPA, as adopted by the CAFC, both as to the applicable judicial standard and with regard to the specific trademark at issue.

In view of the foregoing and for the protection not only of the purchasing public but also of trademark owners, the Bar Association of the District of Columbia and the District of Columbia Bar respectfully submit that the petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

THE BAR ASSOCIATION OF THE  
DISTRICT OF COLUMBIA AND  
THE DISTRICT OF COLUMBIA BAR  
By Their Counsel

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James N. Dresser,  
Chairman, Patent, Trademark  
and Copyright Law Section of  
The Bar Association Of The  
District of Columbia,  
1819 H Street N.W.,  
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(202) 659-2811

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(202) 293-7060

**Of Counsel**

Jay F. Moldovanyi  
Amicus Briefs Committee,  
Patent, Trademark  
And Copyright Law Section  
of The Bar Association  
Of The District of Columbia  
699 Prince Street  
Alexandria, Va 22313

J. Timothy Hobbs,  
Chairman, Trademarks Committee,  
Division 14 of The District  
Of Columbia Bar  
1730 Rhode Island Avenue, N.W.  
Washington, D.C. 20036